Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

TREV CLARK,

Petitioner,

v.

LA MARQUE INDEPENDENT SCHOOL DISTRICT; RUSSELL E. WASHINGTON, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE FOR LA MARQUE I.S.D.; BEN CAVIL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ASSISTANT SUPERINTENDENT OF ADMINISTRATION FOR LA MARQUE I.S.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions:

Petitioner, a high school teacher, was falsely accused by a female minor student of having sexual relations with her. The school district that employed Petitioner suspended him pending an investigation. The investigation, conducted by the two individual Respondents, established that the student had made the same or similar allegations against numerous other male faculty; one, in particular, being of the same lurid detail as the accusation against Petitioner.

The two individual Respondents concluded the student's allegations were so wholly devoid of credibility as to preclude pursuit of the allegations against the other male teacher(s) accused. Nevertheless, the Respondents caused a felony criminal charge to be commenced against Petitioner, and subsequently terminated the employment of Petitioner while the charge was pending. Petitioner was arrested at his home, and prosecuted through a jury trial where an acquittal was returned promptly after submission.

Petitioner's teaching career is ruined on the unhappy circumstance that he was simply the first person falsely accused, instead of the second. Respondents simply refused to consider the exculpatory information established in the course of the investigation.

Petitioner's cause for malicious prosecution was disposed of by summary disposition finding that no evidence was presented establishing the "probable cause" and "malice" elements.

QUESTIONS PRESENTED FOR REVIEW – Continued

I. Did the district court err in resolving by summary disposition Petitioner's claim for malicious prosecution under *Albright v. Oliver*, 510 U.S. 266 (1994), and *Kerr v. Lyford*, 171 F.3d 330 (5th Cir. 1999)?

II. Did the district court, on facts known to Respondents prior to Petitioner's arrest, err in refusing to find no probable cause where the minor student's allegations in issue were so tainted as to " . . . render the allegations nugatory, thereby removing this factor from the probable cause calculation"? *Kerr*, 171 F.3d at 341.

III. Did the district court, on facts known to Respondents prior to Petitioner's arrest, err in refusing to find as a matter of law, under 42 U.S.C. § 1983, that the malice element of malicious prosecution is met on a showing of reckless or callous disregard for, or indifference to, known constitutional rights of Petitioner?

IV. Did the district court, on facts known to Respondents prior to Petitioner's arrest, err in failing to find that genuine material factual disputes exist as to the elements of probable cause and malice so as to require a determination of all issues in a trial by jury under *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

LIST OF PARTIES

1. Petitioner: Trev Clark
2. Respondent: La Marque Independent School District
3. Respondent: Russell E. Washington, Jr., Individually and in His Official Capacity as Chief of Police for La Marque Independent School District
4. Respondent: Ben Cavil, Individually and in His Official Capacity as Assistant Superintendent of Administration for La Marque Independent School District

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the judgment and opinion of the United States District Court for the Southern District of Texas, Galveston Division, in its cause No. G-99-668, rendered on January 4, 2002.

OPINIONS BELOW

The Opinion of the United States Court of Appeals, Fifth Circuit, is reproduced in the appendix to this petition, p. App. 1. The Order of the United States District Court for the Southern District of Texas, Galveston Division is reproduced in the appendix to this petition, p. App. 4. The judgment of the United States District Court for the Southern District of Texas, Galveston Division is reproduced in the appendix to this petition, p. App. 19. The Order of the United States Court of Appeals, Fifth Circuit, denying Petitioner's Petition for Rehearing is reproduced in the appendix to this petition, p. App. 21.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals, Fifth Circuit, was rendered on November 4, 2002. The Final Judgment and Memorandum and Order were rendered on January 4, 2002. The Order of the United States Court of Appeals, Fifth Circuit, denying Petitioner's Petition for Rehearing was rendered on December 4, 2002. This Petition was timely filed within 90 days of said Order.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

CONSTITUIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature of Case

A female student of La Marque Independent School District ("LMISD") falsely and maliciously accused Trev

Clark ("Petitioner") of having an improper sexual relationship with her. At the time of this allegation, Petitioner was an LMISD teacher and coach who had consistently received excellent performance evaluations. An investigation was commenced by LMISD, Russell E. Washington, Jr. ("Washington") and Ben Cavil ("Cavil") (collectively "Respondents") under LMISD policy, custom and practice. At the conclusion of the investigation, Respondents encouraged and instigated a felony criminal action against Petitioner, *State of Texas v. Trev Clark*, in the 212th Judicial District Court of Galveston County, Texas (Number 96-CR-0497). Petitioner was innocent and a jury required less than 30 minutes to acquit Petitioner of the felony charges on December 14, 1998.

Respondents took such action in spite of the fact that each Respondent discovered evidence establishing that the student's claims were false and made with malice. Additionally, in an effort to bolster the criminal prosecution, and otherwise prejudice Petitioner, Respondents initiated termination proceedings at LMISD, which proceedings, separately appealed under state law, have resulted in the complete destruction of Petitioner's professional teaching career.

Petitioner sued Respondents alleging malicious prosecution. Respondents filed a Motion for Summary Judgment. The District Court granted the motion and entered final judgment. The Fifth Circuit Court of Appeals affirmed the decision of the District Court.

Facts of the Case

In the fall of 1995, a female student of LMISD accused Petitioner of having an improper sexual relationship with

her. Petitioner was a LMISD high school teacher and coach with an excellent record. He was also the linebacker coach for two state championship football squads. Petitioner was suspended and Respondents conducted an investigation of the accusation.

The investigation was procedurally deficient in many respects. Nevertheless, each Respondent discovered evidence establishing that the student's claims were false and made with malice. Most dramatic of the evidence discovered was that the same student had alleged a similar and equally graphic story against Kelly Hazen ("Hazen"), another coach employed by LMISD. Hazen continues in his employment and was neither suspended nor terminated and no criminal charges were pursued against him. The investigation also established that the same student had made numerous similar allegations against other male faculty members (Messrs. John Joiner, Michael Bielstein, Robert Neal Wiley and Kevin Borgfelt). No physical evidence existed to corroborate any of the student's many allegations, and no adverse action was taken against any of these several male faculty members. Petitioner was simply the first one accused.

Despite such knowledge and information, Washington and Cavil proceeded to pursue a criminal indictment, arrest and a felony prosecution of Petitioner. With the criminal charges pending, Respondents terminated Petitioner from his employment with LMISD.

The Investigation Prior to Arrest

Sergeant Robert B. Judson ("Judson") of the LMISD Police Department testified at the criminal trial that he made preliminary notes of his investigation. However, at

some point in time, these notes were lost. Judson agreed that in this case there was no physical evidence of a sexual assault (*i.e.*, hair samples, skin under the fingernails, *etc.*). Because there was no physical evidence, Judson understood it was imperative that the complainant's story be tested since the statements would constitute the primary evidence in the case.

Washington, Police Chief of the LMISD Police Department, testified that he called the student into his office and personally interviewed her to "make sure *some* of her facts were true . . . to see if there are any holes . . . in the statement." Yet, in an earlier deposition, Washington stated that he did not "run a test on her credibility." On the facts established, one wonders what type of test would have been conducted. Despite the incredible information before him, discussed in more detail, *infra*, Washington advised an intake District Attorney of Galveston County, Texas, of the charges.

Washington then contacted a number of police agencies, including Children's Protective Services, regarding the case; and, contacted a physician to have a "rape kit" done on the student. Washington prepared an affidavit and obtained search warrants for Petitioner's home and body. Washington personally executed each of these warrants and was present during the search and arrest of Petitioner.

The authorities searched Petitioner's home, taking photographs and video recordings of Petitioner's bedroom and its contents. These items included an oriental fan on the wall, a large knife in a brown sheath hanging on the wall, a lacquer waterbed and a nightstand. Also recovered were two

common Trojan condoms, a daily planner, magazines, videotapes and other personal items.

Washington admits that the exterior of Petitioner's home was made of white brick with brown trim, and that a large window in the front of the house permits one to observe Petitioner's bedroom.

Washington admits that he had no training in statutory rape cases. He further admits that in statutory rape cases no assault occurs, and there is seldom any traditional form of evidence as might be found in a typical rape case (an unwanted encounter). He admits that in this type of case, the accuracy of statements from the witnesses, particularly the complaining witness, is critically important where there is no physical evidence as is frequently available in a traditional rape case.

From his report, dated March 29, 1996, Washington confirmed a number of discrepancies in the student's story, which he ignored. Washington knew that while the student alleged she engaged in anal sex with Petitioner, her medical examination found no evidence to support such a claim. When attempting to corroborate other information obtained from the student, Washington found that the student's description of Petitioner's house was incorrect (she claimed it was a "brown house," when in fact it was a white brick house with brown trim). The student did not know the address of the house or the number of bedrooms it had.

Washington did not discuss the student's allegations against the Petitioner with Principal Carol Robinson, Petitioner's supervisor at the school the student attended.

When he spoke with the student's friends, Washington was informed in January, 1997, that not only did the student tell them about a sexual relationship with Petitioner, but also spoke of a similar relationship with Hazen. Even though Washington knew of this student's allegations against Hazen, Washington decided to treat his investigation of the Hazen allegation as a "separate investigation," and closed his investigation of Petitioner. Wholly missing the point, Washington felt that the strikingly similar charge against Hazen had no bearing on his investigation of Petitioner, stating, "It's not my place to go talk to Kelley Hazen about what transcribed between Amy and Mr. Clark."

Prior to Petitioner's arrest, Washington stated he did not believe the student's allegations were credible. Washington now admits that false statements made by the student regarding Hazen would have borne heavily on the credibility of her allegations against Petitioner, especially where his entire case depended on the credibility of this single witness. This realization comes too late to offer much consolation to Petitioner in the loss of his professional career.

During his investigation of Petitioner, Washington also discovered that the student had made similar allegations against other individuals. Washington's investigation into these allegations proved that there was no truth to them. Washington admits that the student changed her story and made allegations of sexual relationships with other coaches while he was investigating Petitioner.

Washington admitted that the student's telephone records showed over a thousand telephone calls not only to Petitioner, but also to other male teachers, including

Hazen, John Joiner, Michael Bielstein, Robert Neal Wiley and Kevin Borgfelt. His investigation at the time revealed no evidence of a sexual relationship between the student and Hazen, Joiner, Bielstein, Wiley or Borgfelt. Yet, the student's false allegations and pattern of calling these other LMISD employees was, again, simply not deemed significant.

Cavil, LMISD Assistant Superintendent for Administration, was the supervisor responsible for LMISD personnel matters. Cavil supervised the "two-fold" investigation. One was conducted by Washington, the other conducted by Cavil, as a personnel matter within LMISD. Cavil did not take notes on his conversations with witnesses and investigators.

Cavil also knew that the same allegations made against Petitioner by the student had been made against Hazen and the numerous other male faculty. Cavil admits that LMISD allowed Hazen to continue working, while Petitioner, the first person accused, was suspended, arrested and prosecuted.

Cavil admits that he had been informed by Principal Robinson that the student had lied many times before. Cavil also freely admits that the student had admitted to lying more than once, that her story has changed several times, and that he believes her allegations against Hazen and other faculty members were false.

Cavil knew that Petitioner denied having any sexual relations with the student, as had all other faculty members made the subject of the student's allegations.

Principal Robinson did not recommend Petitioner's termination. Cavil did. The LMISD school board was

growing restless, given the long delay in criminal prosecution of the case, with Petitioner on paid suspension. Prior to the criminal case being called to trial, Petitioner was terminated.

Cavil admits that there was no reason to terminate Petitioner other than the allegation of a sexual relationship with a student.

No Physical Evidence

Richard Earl Rupp, M.D., a physician with the University of Texas Medical Branch at Galveston, Pediatric Clinic, testified at the criminal trial. He is trained in diagnosing and treating sexual abuse/neglect cases involving minors. Dr. Rupp indicated that, based solely on his review of the student's medical records, he found no evidence of abuse. Dr. Rupp indicated the findings of the student's medical examination showed no evidence of anal intercourse (*i.e.*, warts, discharge, tears, scars of the anus).

Allegations Against Hazen and Others

The female student's allegations against Hazen were remarkably similar to those she asserted against Petitioner. These allegations described a sexual encounter involving vaginal sex with a condom in Hazen's truck, while parked on the beach in San Leon, Texas.

Hazen also stated that while he was in San Antonio, Texas, for a medical conference, he received a call from the student. The student had taken his number from a marker board in the training room. Hazen also heard that the student was now making allegations about having an improper relationship with him. Mr. Hazen states that

after these allegations were made, a new policy was issued regarding the student. The policy was that this particular student could not enter the training room unless three or more staff members were present.

This LMISD policy was clearly made and implemented with the notion that the student was capable of making wild allegations, and to protect any further injury to the staff.

Hazen stated that one day, after a new female trainer was hired, he was walking out of the training room as the student was walking into the room. The student asked Hazen to look at her knee, and Hazen pointed to the new trainer and told the student that that the new trainer would handle it. The student's response was, "Are you too f___ good to treat me?"

Respondents also knew the following about the student at the time of Petitioner's arrest:

A. The student developed a practice as early as junior high school of calling male teachers and attempting to establish improper relationships with them.

B. The student made literally thousands of such calls, with some 1200 being documented in the short time frame reviewed by LMISD.

C. The student alleged personal relationships with Hazen; her junior high band director, Kevin Borgfelt, deceased; Mike Bilstein; John Joiner; an unnamed janitor; and others.

D. The student alleged adult relationships with these male teachers as "friends" rather than a normal student/teacher relationship.

E. The student developed a crush on Petitioner when the student was a sophomore. She admits Petitioner told her nothing could come of it because she was a student and he was a teacher.

F. The student alleged a sexual relationship with Petitioner while the student was a sophomore and junior. As a junior, the student also alleged a sexual relationship with Hazen.

G. Petitioner had vehemently denied the relationship.

H. The student was very angry that her allegations against Kelley Hazen did not result in his termination from employment and criminal prosecution, as was suffered by Petitioner.

Other Facts Known to Respondents During Investigation

Respondents' investigation also uncovered the following facts about the student:

A. The student's friends, including her "best friend," stated to all relevant authorities that they " . . . never knew when Amy was telling the truth."

B. The student admitted lying to Principal Robinson about the student's relationship with Petitioner, and, later, about Hazen.

C. Even though the student claims to have performed oral sex on Petitioner, she was unable to state whether he is circumcised.

D. The student admitted that she told Hazen, after Petitioner's suspension, that she had not had sex

with Petitioner and that she had lied about it when saying she did.

E. The student admitted Petitioner's bedroom could easily be viewed from the front of the house by looking through a window and that a person could easily make such observations unnoticed due to the brick facade on the front of the house.

F. The student described a "one-way" relationship; *i.e.*, she gave Petitioner notes, he never gave her one; she called him literally thousands of times without him calling her.

G. In regard to the allegation of a sexual encounter with Petitioner on the school campus March 14, 1996, the student's testimony was impeached as to whether automatic lights were activated, an event significant enough to be remembered if true.

H. The student had developed intense feelings of anger following Petitioner's refusal of her attentions, expressing such anger in obscene, threatening letters filed with the school social worker, Rita Baldwin.

J. Despite the alleged intimacy, the student could not recall Petitioner's abdominal stitches, scarring or other obvious physical characteristics related to his November 1994 hernia operation.

The student admitted that her March 14, 1996, statement to Washington contained numerous incorrect statements. The errors in the statement include:

A. Describing Petitioner's house as a brown brick home when it is white brick.

B. Stating that the house had 2 bedrooms when it has 3.

C. Stating that Petitioner's bedroom had a dresser in it (later changed to two (2) dressers), when it had no dressers.

D. No mention of the two extremely unique lamps (a man holding a woman up who in turn holds the light bulb), which she included only after being prepared by Respondents for two hearings and a deposition.

E. No mention of a fan that covered one entire wall in Petitioner's bedroom.

The only items in Petitioner's bedroom identified by the student were those visible from the front window of Petitioner's home, while the omitted items were not.

The student claims that she did not have sex with Petitioner in January, February or March of 1996, except on February 18th and 20th, because Petitioner had a girlfriend at that time. The student also admitted that she had threatened Petitioner when rebuffed by stating that she "would get into his shit" and "F___ up his life."

Additional Investigation

Jim Wilson ("Wilson"), a private investigator hired by Petitioner to examine all of the student's telephone records, found LMISD had sufficient information to show the student's story wholly lacked credibility. Prior to Petitioner's arrest, Wilson reviewed the telephone records obtained by LMISD in March 1996, and found that the student had called numerous LMISD teachers and coaches including: (a) Hazen, 26 times; (b) John Joiner, 100 times (30 times in 1995; 70 times in 1996); (c) Robert Wiley, 101 times (62 times in 1995; 39 times in 1996); (d) Bill Steiner, 8 times; and Kevin Borgfelt, 68 times in 1993.

Calls to these recipients were known to Cavil and Washington because the calls occurred in the same time frame that the student alleges she had an affair with Petitioner. The calls appeared on the same telephone statements, acquired by Respondents prior to arrest, as the calls to Petitioner. However, LMISD ignored these calls to other male faculty and manipulated the information to offer factual support for a felony prosecution of Petitioner.

The telephone records indicate that the student placed 1,286 telephone calls to Petitioner's home between 1993 and 1996. Of these calls, the records reveal that 1,099 lasted less than three minutes, which Wilson identifies as "hang-up" calls. In the same three-year time period, Petitioner received 190 calls lasting over 5 minutes from the student. However, of all these calls, only two (2) calls were made from Petitioner's residence to the student's home. One made on November 11, 1995 at 2:17 p.m. lasted about 12 minutes, and the other on September 9, 1995 at 12:03 p.m. (three minutes after noon) lasted only three minutes.

Hazen testified that during a rehabilitation session with the student, he, having heard student rumors at school, asked jokingly, "Amy, what's going on with you and Coach Clark?" The student denied any such relationship and Hazen never thought anything else about it.

James Gradoni ("Gradoni"), a private investigator for LMISD who testified for Petitioner at the criminal trial, indicated that the most important thing in the initial stages of any sexual assault investigation is to perform a thorough interview with the victim. Gradoni indicated that a confession should be done with a tape recording,

and, that the initial interview should include a complete examination of all information that can be obtained. A formal statement is a synopsis of the event. Gradoni also indicated that an investigation should not close if further allegations are found. Numerous other allegations would be an indication that the complaining witness was making up allegations.

On the facts known to Respondents prior to arrest, the student's story was, in a word, nonsensical.

REASONS FOR GRANTING THE WRIT

The district court erred by granting summary judgment in favor of all Respondents on the necessary elements of proximate cause and malice. Petitioner would urge here that the judgment of the district court should be reversed and rendered, or remanded for trial, under *Albright v. Oliver*, 510 U.S. 266 (1994), *Kerr v. Lyford*, 171 F.3d 330 (5th Cir. 1999), and other relevant authorities cited *infra*.

Review of the district court's summary judgment decision is *de novo*, applying the same standard on appeal that was applied by the district court. *See Pratt v. City of Houston*, 247 F.3d 601, 605-06 (5th Cir. 2001). Summary judgment may be granted only if there is no genuine issue as to material fact and the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c). In determining whether summary judgment is appropriate, a court views the evidence introduced and all factual inferences from that evidence in a light most favorable to the party opposing the motion and all reasonable doubts about the facts will be resolved in favor of the nonmoving litigant.

See Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., Inc., 669 F.2d 1026, 1031 (5th Cir. 1982).

Summary judgment is proper in a case only if there is no genuine issue of material fact. FED R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). A respondent who seeks summary judgment on a petitioner's cause of action must demonstrate the absence of a genuine issue of material fact. *Celotex,* 411 U.S. at 327. The respondent, as movant, cannot rely on conclusory statements to establish that the petitioner has not presented evidence on an essential element. Rather, the respondent must demonstrate an absence of a genuine factual dispute. *Id.* Only if the respondent meets its burden is the petitioner required to respond by summary judgment proof to show a genuine issue of material fact. *Id.* To support a motion for summary judgment, "the moving party . . . has] the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Petitioner's claim is brought under the Fourth Amendment. *Albright*, 510 U.S. at 271. Justice Ginsburg describes the Fourth Amendment's instruction to police officers as purposive and embracing, and suggests that the common law may aid contemporary inquiry into the meaning of the Amendment's term "seizure." *Id.* (citing *California v. Hodari D.*, 499 U.S. 621, 626, n.2 (1991)). Justice Ginsburg's concurring opinion states:

> At common law, an arrested person's seizure was deemed to continue even after release from official custody. The purpose of an arrest at common law, in both criminal and civil cases, was "only to

> compel an appearance in court," and "that purpose is equally answered, whether the sheriff detains [the suspect] person, or takes sufficient security for his appearance, called bail." The common law thus seems to have regarded the difference between pretrial incarceration and other ways to secure a Respondent's court attendance as a distinction between methods of retaining control over a Respondent's person, not one between seizure and its opposite.

Id. at 277-78 (citations omitted).

A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. *Id.* at 278. He is required to appear in court at the state's command. *Id.* He is often subject to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. *Id.* Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense. *Id.*

A criminal respondent released pretrial is still "seized" in the constitutionally relevant sense. *Id.* at 279. Such a respondent is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges. *Id.* He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court. *Id.* It is recognized, however, that the respondent remains effectively "seized" for trial so long as the prosecution against him remains pending, and that

any testimony at the preliminary hearing, if deliberately misleading, violates the Fourth Amendment by perpetuating the seizure. *Id.* at 280.

The Supreme Court has in the past noted that the Fourth Amendment's relevance to the deprivations of liberty go hand-in-hand with criminal prosecutions. *Id.* at 274 (citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to any extended restraint on liberty following an arrest)). The Supreme Court has also held that the accused is not "entitled to judicial oversight or review of the decision to prosecute." *Gerstein*, 420 U.S. at 118-19; *see also Beck v. Washington,* 369 U.S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U.S. 586 (1913). Here, Petitioner was not merely charged; he was arrested.

The formal commencement of a criminal proceeding is quintessentially this type of state action. The initiation of a criminal prosecution, regardless of whether it prompts an arrest, immediately produces "a wrenching disruption of everyday life." *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 814 (1987). Every prosecution, like every arrest, "is a public act that may seriously interfere with the Respondent's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion,* 404 U.S. 307, 320 (1971). In sum, an official accusation of serious crime has a direct impact on identified liberty interests. The impact is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection.

Indeed, the Fourth Amendment provides both procedural and substantive protections, and these protections converge. When the Supreme Court first held that the right to be free from unreasonable official searches was "implicit in 'the concept of ordered liberty,'" and therefore protected by the Due Process Clause of the Fourteenth Amendment, it refused to require the States to provide the procedures accorded in federal trials to protect that right. *Wolf v. Colorado*, 338 U.S. 25, 27-33 (1949). Significantly, however, when the Supreme Court overruled the procedural component of that decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court specified that it was "extending the substantive protections of due process to all constitutionally unreasonable searches – state or federal." *Id.* at 655.

The Fifth Circuit has held that allegations of malicious prosecution and civil conspiracy are actionable under 42 U.S.C. §§ 1983 and 1985. *John Doe v. State of Louisiana,* 2 F.3d 1412 (5th Cir. 1993); *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, *modified on reh'g on other grounds*, 744 F.2d 1131 (5th Cir. 1984); *Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992); *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988); *see also Elkins v. United States,* 364 U.S. 206, 213 (1960) (holding that the Fourteenth Amendment extends the Fourth Amendment's constitutional guarantees to searches and seizures by state officers); *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1303 (5th Cir. 1995) (stating "this circuit has explicitly held that malicious prosecution, false arrest and bodily harm . . . violate the Fourth and Fourteenth Amendments.").

A viable Section 1983 claim for malicious prosecution exists against government officials in their individual capacities, where they procure groundless state indictments

and charges with fabricated evidence or no evidence. *Board of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *Michigan v. Summers*, 452 U.S. 692, 696 n.5 (1981); *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *United States v. Price*, 383 U.S. 787, 806 (1966).

Petitioner's malicious prosecution claim implicated a clearly established constitutional right at the time of the events in question. *See Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d at 1303, 1305. In *Albright*, it was suggested that the proper cause was under the Fourth Amendment rather than the Fourteenth Amendment. *Albright*, 510 U.S. at 275. However, the commitment may not be as clear as found below given the several opinions delivered in *Albright*, which, in any event, left undisturbed the Fifth Circuit's longstanding recognition of a Fourth Amendment right to be free from malicious prosecution. *See Eugene*, 65 F.3d at 1303.

To prevail in a suit alleging malicious prosecution of a criminal proceeding, a petitioner must establish: (1) a criminal prosecution was commenced against the petitioner; (2) the respondent initiated or procured the prosecution; (3) the prosecution was terminated in the petitioner's favor; (4) the petitioner was innocent of the charge; (5) the respondent did not have probable cause for the proceeding; (6) the respondent acted with malice; and, (7) the petitioner suffered damages as a result of the prosecution. *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997); *Browning-Ferris Indus. v. Lieck*, 881 S.W.2d 288, 291-93 (Tex. 1994); *Brown v. Lyford*, 243 F.3d 185, 189 (5th Cir. 2001). The elements of a malicious prosecution action under 42 U.S.C. § 1983 are similar, and follow the common-law tort of malicious prosecution. *Albright*, 510 U.S. at 271 n.4 (1994).

In the present case, Respondents' Motion for Summary Judgment did not dispute elements 1, 3, 4, and 7. It is undisputed that a criminal prosecution was commenced by Respondents against Petitioner; that the prosecution was terminated in Petitioner's favor, thereby establishing Petitioner's innocence; and, that Petitioner suffered substantial damages as a result of the prosecution.

The district court judgment finds deficiency only as to the elements of probable cause and malice.

The district court first finds that probable cause existed to prosecute Petitioner on "the totality of the circumstances." Petitioner would suggest that any objective review of the totality of these circumstances compels an opposite result.

For purposes of malicious prosecution, probable cause means the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, a fair probability that the person charged was guilty of the crime for which he was prosecuted. *Kerr*, 171 F.3d at 340. A plaintiff must demonstrate that either (a) the record affirmatively establishes that probable cause was lacking or (b) that enough genuine, material factual disputes exist regarding the elements of probable cause that the ultimate finding of probable cause is lacking, or the subject of a genuine, material factual dispute. *Id.*; *Blackwell v. Barton*, 34 F.3d 298, 305 (5th Cir. 1994).

Petitioner met his burden in this regard and the judgment below is clearly erroneous. The evidence relied upon to establish probable cause in the *Kerr* case is instructive and included the following:

1. Statements of minor witnesses implicating the Kerrs in their sexual abuse and abduction, rape, and murder of a woman named Kelly Wilson;

2. Medical examinations of minor children that revealed scarring consistent with their tales of sexual molestation;

3. Confessions and statements supplied by three adult witnesses verified by polygraph, and consistent with those of the children in implicating the Kerrs in the kidnapping, rape, and murder of Wilson;

4. Corroborative physical evidence such as masks, knives, and other instrumentalities of restraint and torture that were referred to by the children;

5. An infrared scanning device and a cadaver-sensing dog suggesting the presence of human remains on the Kerr's property, and bones (albeit not conclusively human) were unearthed; and,

6. The shed in the Kerrs' backyard, which had been identified by some of the children and the adults as the place where Wilson's body had been kept, was also alerted to by the dog and, suspiciously, showed signs of recent washing and repainting.

Kerr, 171 F.3d at 340-41.

In the case at bar, Respondents stand on a minor student's statement ostensibly corroborated by the fact that a green package containing two common Trojan condoms was discovered in the bedroom of Petitioner, a

single male adult. Even Washington acknowledges that this fact is of no significance.

The Fifth Circuit in *Kerr* determined that the mishandling of the investigation into the children's allegations by the investigators so tainted the children's recollections as to " . . . *render their statements nugatory, thereby removing this factor from the probable cause calculation.*" *Id.* at 341 (emphasis added). However, the *Kerr* Court found that the Respondents did have probable cause to prosecute the Kerrs based on the totality of *other evidence* (medical examinations of the children, substantial corroborative physical evidence recovered from the Kerr's property, the corroborating adult confessions and witness statements, *etc.*). *Id.*

In the instant case, the medical experts agree there is no physical evidence of any sexual abuse. It is equally clear that there is no significant evidentiary corroboration of the minor female student's allegations against Petitioner.

In *Kerr*, the investigators' personal notes indicated the investigators had reservations about the truthfulness of some of the witness statements. *Id.* Here, Respondents destroyed their investigative notes or made none.

There was no probable cause to charge Petitioner, or alternatively, a fact issue is presented for trial.

Punitive damages may be awarded for a defendant's conduct that is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. *Kolstad v. ADA*, 527 U.S. 526, 536 (1999) (citing *Smith v. Wade*, 461 U.S. 30 (1983)).

Respondents' malicious actions herein are sufficiently egregious to meet the federal test and, under the circumstances of this case, the Respondents' overzealous prosecution of Petitioner shocks the conscience of any reasonable person. This criminal prosecution was brought with malice and in bad faith, defined by Petitioner as a reckless or callous disregard for, or indifference to, Petitioner's clearly established constitutional rights, and violates 42 U.S.C. § 1881 (the Civil Rights Act of 1991 as amended); 42 U.S.C. § 1983; the Fourth Amendment; and, the Fourteenth Amendment.

As a direct and proximate cause of the acts of Respondents, Petitioner has (a) lost his employment; (b) sustained irreparable damage to his personal and professional reputation; (c) been stigmatized with the attendant foreclosure of professional employment opportunities; (d) suffered mental anguish; and, (e) suffered substantial pecuniary loss. For over two years, Petitioner was required to attend numerous court hearings and proceedings and suffer the anxiety and uncertainty attendant to his termination from employment and a felony criminal prosecution.

Petitioner was a teacher of impeccable reputation as evidenced by his performance evaluations and his recommendation by the head football coach of LMISD. With allegations of such dire consequence, Respondents should at least have been minimally concerned with the truth to ensure that Petitioner's reputation was not being unjustly maligned. In failing to do so, Respondents demonstrated a reckless or callous disregard to, or indifference to, established constitutional rights of this Petitioner.

Respondents had a duty to approach the investigation of such allegations with reasonable caution to avoid stigmatizing an innocent teacher. It is not disputed that Cavil conducted his investigation, and supervised the investigation of a school district police officer reporting to him, under routine LMISD policy, custom and practice.

Here, Respondents acted with malice towards Petitioner, or alternatively, a fact issue is presented for trial.

Respondents were not entitled to dismissal of Petitioner's federal claims. The authority cited in Respondents' Motion for Summary Judgment, contrary to Respondents' assertions, affirms Petitioner's right to sue these Respondents for liability and damages under the Fourth and Fourteenth Amendments. *Kerr*, 171 F.3d at 339 (holding the right under the Fourteenth Amendment to be free from malicious prosecution was "clearly established" in this circuit); *see also Elkins v. United States,* 364 U.S. 206, 213 (1960) (holding that the Fourteenth Amendment extends the Fourth Amendment's constitutional guarantees to searches and seizures by state officers). In fact, the Fifth Circuit has routinely held that a case of malicious prosecution may give rise to a claim under 42 U.S.C. § 1983 based on the Fourteenth Amendment. *Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993).

When considering a motion for summary judgment, a court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Id.* Thus, although a

court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. *Id.* That is, a court should give credence to the evidence favoring the nonmovant, as well as that evidence supporting the moving party, that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. *Id.*

In this case, the disctrict court was required to determine (1) whether the petitioner alleged a constitutional violation; (2) whether the law regarding the alleged violation was clearly established at the time of the operative events; and (3) the record shows that the violation occurred, or at least gives rise to a genuine issue of material fact as to whether Respondents engaged in conduct that violated clearly established law. *Kerr*, 171 F.3d at 339. Petitioner carried his burden in each of these elements and is entitled to his day in court to such redress for the injuries suffered at the hands of these Respondents.

CONCLUSION

Petitioner respectfully requests that this Court review the Order Granting Respondents' Motion for Summary Judgment and the Final Judgment of the district court below, and on such review, reverse and render where appropriate, or reverse and remand for a trial on the merits.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40217
Summary Calendar

TREV CLARK,

Plaintiff-Appellant,

versus

LA MARQUE INDEPENDENT SCHOOL DISTRICT; RUSSEL E. WASHINGTON, JR., Chief of Police, Individually and in his official capacity as Chief of Police for La Marque, ISD; BEN CAVIL, Individually and in his official capacity as Assistant Superintendent of Administration for La Marque, ISD,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. G-99-CV-668

(Filed Nov. 4, 2002)

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4

Trev Clark Appeals from the summary judgment dismissal of claims under 42 U.S.C. §§ 1981, 1983, and 1985, as well as under Texas law, against the La Marque Independent School District (LMISD), Russell Washington, and Ben Cavil. The action stems from Clark's dismissal from his position as a teacher and coach and his subsequent acquittal on criminal charges that he engaged in sexual relations with a minor female student.

Clark has abandoned any arguments relating to the district court's dismissal of his claims under 42 U.S.C. §§ 1981 and 1983, as well as his state law malicious prosecution claim against LMISD, by failing to brief them on appeal. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (issues not adequately argued in the body of the brief are deemed abandoned).

To establish the liability of a municipality under 42 U.S.C. § 1983, a plaintiff must demonstrate that an official policy or custom caused the constitutional violation. *See Piotrowski v. City of Houston*, 51 F.3d 512, 517 (5th Cir. 1995). A plaintiff raising a constitutional claim against a municipality must identify the policy, connect the policy to the municipal body, and show that the particular injury occurred because of the execution of the policy. *See Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984) (en banc). Clark has failed to show that he identified the policy or custom at issue in the district court. Accordingly, we affirm the dismissal of this claim. *See id.* Because Clark's allegations of prosecutorial misconduct against LMISD are identical to his allegations regarding Washington and Cavil, the district court properly dismissed claims against Washington and Cavil in their official capacities. *See Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001).

Clark's Fourteenth Amendment malicious prosecution claim against Washington and Cavil in their individual capacities fails because such a claim is not actionable. *See Kerr v. Lyford*, 171 F.3d 330, 339 (5th Cir. 1999). The district court dismissed Clark's Fourth Amendment malicious prosecution claim against the individual defendants because Clark had failed to make a sufficient showing that Washington and Cavil lacked probable cause. To prevail, Clark "must demonstrate that either (1) the record affirmatively establishes that probable cause was lacking or (2) enough genuine, material factual disputes exist regarding the elements of probable cause that the ultimate finding of probable cause is the subject of a genuine, material factual dispute." *See id.* at 340. After a thorough review of the record and the arguments of counsel, we have determined that Clark has failed to make the required showing.

Finally, because the elements of a claim of malicious prosecution under state law are coextensive with the elements of a claim under 42 U.S.C. § 1983, *see Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994); *see also Gordy v. Burns*, 294 F.3d 725-26 (discussing *Taylor* and holding generally that the elements of a 42 U.S.C. § 1983 malicious prosecution claim are coextensive with the elements of a claim under state law), we affirm the dismissal of Clark's state law claim against Washington and Cavil.

The district court's judgment is in all respects AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

TREV CLARK	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	G-99-668
LA MARQUE I.S.D., RUSSEL E. WASHINGTON, JR., individually and in his capacity as Chief of Police for La Marque I.S.D., and BEN CAVIL, individually and in his official capacity as Assistant Superintendent of Administration for La Marque I.S.D.	§	
Defendants.	§	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Trev Clark ("Clark") brings this malicious prosecution and civil conspiracy lawsuit against Defendants La Marque Independent School District ("LMISD"), Russel E. Washington, Jr. ("Washington"), individually and in his official capacity as Chief of Police for LMISD, and Ben Cavil ("Cavil"), individually and in his official capacity as Assistant Superintendent of Administration for LMISD, pursuant to 42 U.S.C. §§ 1981, 1983 and 1985 and Texas state law. Now before the Court is Defendants' Motion for Summary Judgment on grounds that Clark's claims against them are wholly without merit. For the reasons articulated below, Defendants' Motion for Summary Judgment is hereby **GRANTED**.

I.

Clark, a former LMISD history teacher and football coach, originally filed this lawsuit against Defendants in the 122nd Judicial District Court of Galveston, Texas on September 9, 1999. In his Original Petition, Clark alleges that he was falsely accused by Amy Castillo ("Castillo"), a female student, and Defendants of having an improper relationship with Castillo during the 1995-96 school year. Clark further alleges that Defendants proceeded to pursue his criminal indictment and felony prosecution for sexual assault of a minor, all the while ignoring "voluminous exculpatory evidence" that established Clark's innocence. Finally, Clark alleges that Washington and Cavil withheld exclupatory [sic] evidence during his criminal trial and initiated school district termination proceedings against Clark in an effort to bolster the criminal charges levied against him. Defendants subsequently removed the lawsuit to this Court on October 29, 1999.

II.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). When one party moves for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id.* at 248, 106 S. Ct. at 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise

properly supported motion for summary judgment. Only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S. Ct. at 2510. Nevertheless, if the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.; see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986); *Dixon v. State Farm Fire & Cas. Co.*, 799 F. Supp. 691 (S.D. Tex. 1992) (noting that summary judgment is inappropriate if the evidence could lead to different factual findings and conclusions). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson,* 477 U.S. at 255, 106 S. Ct. at 2513.

III.

Section 1981 provides that all persons in the United States shall have the same contractual rights as white citizens. *See* 42 U.S.C. § 1981. Claims of racial discrimination brought under § 1981 are governed by the same evidentiary framework applicable to claims of employment discrimination brought under Title VII. *See LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 n.2 (5th Cir. 1996). This evidentiary framework, established by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), requires the plaintiff to prove a prima facie case of discrimination by a preponderance of the evidence. *See id.* at 802, 93 S.Ct. at 1824. In order to establish a prima facie case, the plaintiff must show that (1) he is a member of a protected class, (2) he was qualified for the position, (3) he suffered an adverse

employment action, and (4) his employer sought to replace him with a similarly qualified white employee. *See Pratt v. City of Houston,* 247 F.3d 601, 606 (5th Cir. 2001).

Clark's argument that the conduct upon which his malicious prosecution claim is based may also give rise to a violation of 42 U.S.C. § 1981 necessarily fails because he has not established a prima facie case of discrimination.[1] Most notably, Clark makes no allegation that any of the challenged conduct was motivated by racial considerations. Furthermore, Clark fails to provide any evidence indicating that LMISD sought to replace him with a similarly qualified white employee after his termination. Accordingly, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to Clark's claims brought pursuant to 42 U.S.C. § 1981.

IV.

To state a claim under 42 U.S.C. § 1985(3), a plaintiff must allege: (1) a conspiracy involving two or more persons; (2) for the purpose of depriving him directly or indirectly, a person or class of persons of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States. *Hilliard v. Ferguson,* 30 F.3d 649, 652-53 (5th Cir. 1994) (citing *Deubert v. Gulf Fed. Sav. Bank,* 820

[1] Clark's Original Petition and Response to Defendants' Motion for Summary Judgment both refer to "42 U.S.C. § 1881 (the Civil Rights Act of 1991 as amended)." The Court assumes that Clark actually alleges a violation of 42 U.S.C. § 1981, not 42 U.S.C. § 1881. Section 1881 pertains to the National Medal of Science, not Civil Rights.

F.2d 754, 757 (5th Cir. 1987)); *see also United Bhd. of Carpenters and Joiners of Am., Local 610 v. Scott,* 463 U.S. 825, 828-29, 103 S.Ct. 2680, 3356, 129 L.Ed.2d 814 (1994). In doing so, the plaintiff must also show that the conspiracy was motivated by a class-based animus. *Hilliard,* 30 F.3d at 653 (citing *Burns-Toole v. Byrne,* 11 F.3d 1270, 1276 (5th Cir.), *cert. denied,* 512 U.S. 1207, 114 S.Ct. 2680, 129 L.Ed.2d 814 (1994)).

Clark alleges that Washington, Cavil and LMISD conspired to deprive him of his civil rights in violation of § 1985. Clark's conspiracy claim fails, however, because a school and its officials constitute a single legal entity which cannot conspire with itself. *See Hilliard,* 30 F.3d at 653 (applying the long-standing rule that a "corporation cannot conspire with itself" in the context of a school board); *Hankins v. Dallas Indep. Sch. Dist.,* 698 F. Supp. 1323, 1330 (N.D.Tex. 1988) (high school and its officials constitute a single entity incapable of conspiring with itself); *Zentgraf v. Texas A & M Univ.,* 492 F. Supp. 265, 272-273 (D.C.Tex. 1980) ("the University and its officials constitute a single legal entity which cannot conspire with itself in violation of § 1985"). Clark only alleges actions by school officials in connection with school affairs. Accordingly, the Court concludes that, as a matter of law, no conspiracy among the Defendants could have existed.[2] Thus, Defendants' Motion for Summary Judgment is

[2] Furthermore, Clark does not make any assertions *at all* suggesting that the alleged conspiracy was motivated by a class-based animus. Thus, even if the Court were to find that the Defendants could have conspired with one another, Clark's allegations would still be insufficient to establish a § 1985 cause of action.

hereby **GRANTED** with respect to Clark's claims brought pursuant to 42 U.S.C. § 1985.

V.

Section 1983 provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . . " 42 U.S.C. § 1983; *see also Moore v. Willis Indep. Sch. Dist.,* 233 F.3d 871, 874 (5th Cir. 2000) (citing *Leffall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521, 525 (5th Cir. 1994)).

§ 1983 Claim Against LMISD

Clark's attempt to establish a valid § 1983 cause of action against LMISD fails as a matter of law. Section 1983 only provides a cause of action against local governmental units when the allegedly improper action was taken pursuant to an official policy or governmental custom. *See Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978). However, Clark makes absolutely no reference to any LMISD policy or custom in his Original Petition or in his Response to Defendants' Motion for Summary Judgment. Moreover, the Supreme Court's *Monell* decision clearly bars governmental liability under § 1983 when the liability is premised upon a theory of *respondeat superior.* 436 U.S. at 694; 98 S.Ct. at 2037; *see also Leffall,* 28 F.3d at 525; *Voorhies v. Conroe Indep. Sch. Dist.,* 610 F. Supp. 868, 870 (S.D. Tex. 1985). Given that Clark bases his claims against LMISD solely on the conduct of Washington and Cavil, Defendants' Motion for Summary Judgment is hereby

GRANTED with respect to the § 1983 claim against Defendant LMISD.

Official Capacity Claims Against Washington and Cavil

It is well settled that a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents. *See Monell,* 436 U.S. at 691 n. 55, 98 S.Ct. at 2036 n. 55 (indicating that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent"); *Turner v. Houma Mun. Fire and Police Civil Serv.,* 229 F.3d 478, 483 (5th Cir. 2000); *Welch v. Laney,* 57 F.3d 1004, 1007 (11th Cir. 1995); *Shuford v. Alabama State Bd. of Educ.,* 968 F. Supp. 1486, 1515 (M.D. Ala. 1997). The Supreme Court discussed this proposition in *Kentucky v. Graham,* 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985), stating that "[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id.* Consequently, Clark's § 1983 claims against Washington in his official capacity as Chief of Police for LMISD and Cavil in his official capacity as Assistant Superintendent of Administration for LMISD are simply a reformulation of his claims against LMISD. Given that Clark has named LMISD as a defendant in this action, his claims for § 1983 relief as to Washington and Cavil are redundant. *See Wallace v. City of Montgomery,* 956 F. Supp. 965, 976 (M.D. Ala. 1996). Therefore, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to the official capacity claims brought against Defendants Washington and Cavil.

Individual Capacity Claims Against Washington and Cavil

In response to the § 1983 claim brought against them in their individual capacities, Defendants Washington and Cavil assert the defense of qualified immunity. The Supreme Court explained the standard for qualified immunity in *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 74 L.Ed.2d 396 (1981): "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Thus, before proceeding against a defendant claiming qualified immunity, the Court must determine whether (1) the plaintiff alleges a Constitutional violation; (2) the law regarding the alleged violation was clearly established at the time of the operative events; and (3) the evidence shows that the violation occurred, or at least gives rise to a genuine issue of material fact as to whether the defendants actually engaged in conduct that violated the clearly established law. *See Kerr v. Lyford,* 171 F.3d 330, 339 (5th Cir. 1999) (citing *Rich v. Dollar,* 841 F.2d 1558, 1563 (11th Cir. 1988)). After considering these initial factors, the Court may ask whether the defendants acted within the scope of their authority and with the degree of reasonableness expected of a government official under the relevant circumstances. *See Kerr,* 171 F.3d at 339.

Clark argues that his malicious prosecution claim implicates two of his constitutional rights – his Fourteenth Amendment right to substantive due process and his Fourth Amendment Right to be free from unreasonable search and seizure. Clark's Fourteenth Amendment claim is barred by the Supreme Court's holding in *Albright v.*

Oliver, 510 U.S. 266, 275, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). In that case, Albright's § 1983 claim concerned the malicious initiation of a baseless criminal prosecution against him. *See Albright,* 510 U.S. at 267, 114 S.Ct. at 809. Albright argued that Oliver had deprived him of substantive due process under the Fourteenth Amendment – his "liberty interest" – to be free from criminal prosecution except under probable cause. *See id.* When faced with Albright's claim, the Supreme Court reasoned that his claimed interest was markedly differed from the interests traditionally afforded protection by substantive due process, i.e. matters relating to marriage, family, procreation and the right to bodily integrity, *see id.* at 272, 114 S.Ct. at 812, and ultimately concluded that substantive due process, with its "scarce and open-ended guideposts" afforded Albright no relief. *Id.* at 275, 114 S.Ct. at 814 (citing *Collins v. Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992)). Likewise, the Fourteenth Amendment affords no relief to Clark. As such, Defendants' Motion for Summary Judgment is **GRANTED** with respect to the claims brought against Washington and Cavil, in their individual capacities, pursuant to the Fourteenth Amendment.

Unlike his Fourteenth Amendment claim, Clark's Fourth Amendment claim is not barred by the *Albright* decision.[3] In fact, the Supreme Court suggested that

[3] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Albright's claimed right to be free from malicious prosecution may have warranted judgment under the Fourth Amendment.[4] *See Albright,* 510 U.S. at 274-75, 114 S.Ct. at 813 (noting "the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions"). Thus, *Albright* left undisturbed the Fifth Circuit's "longstanding recognition of a Fourth Amendment right to be free from malicious prosecution." *Kerr,* 171 F.3d at 339 (citing *Eugene v. Alief Indep. Sch. Dist.,* 65 F.3d 1299, 1303 (5th Cir. 1994)). Therefore, the Court concludes that (1) Clark alleges a constitutional violation; and (2) the law regarding the alleged violation was clearly established at the time of the operative events.

This leads the Court to the final question: whether the showings made by the Parties create a genuine issue of material fact as to whether Washington and Cavil actually engaged in conduct that violated the clearly established law. *See Kerr,* 171 F.3d at 339-40 (citing *Rich,* 841 F.2d at 1563). In Texas, the following are elements of a claim for malicious prosecution: (1) criminal action commenced against the plaintiff; (2) the prosecution was caused by the defendants or with their aid; (3) the action terminated in the plaintiff's favor; (4) the plaintiff was innocent; (5) the defendants acted without probable cause; (6) the defendants acted with malice; and (7) the criminal proceeding damaged the plaintiff. See *Kerr,* 171 F.3d at 340 (citing *Hayter v. City of Mount Vernon,* 154 F.3d 269, 275 (5th Cir. 1998)). After a careful review of all of the evidence submitted by the Parties, the Court concludes that most of the

[4] The *Albright* Court declined to rule on the Fourth Amendment issue because it was not raised in Albright's petition for certiorari.

elements of a malicious prosecution claim are undeniably satisfied. However, at least two elements lack substantiation: the evidence does not establish that the Defendants acted without probable cause or with malice, nor does it establish a genuine, material factual dispute regarding these elements.[5]

For purposes of malicious prosecution, probable cause means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor [complainant], that the person charged was guilty of the crime for which he was prosecuted." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999) (citing *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 518 (Tex.1997)); (*see also Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627, 2632, 61 L.Ed.2d 343 (1979)); *Moore v. McDonald*, 30 F.3d 616, 620 n.2 (5th Cir. 1994) (quoting *Pendleton v. Burkhalter*, 432 S.W.2d 724, 727 (Tex.Civ.App – Houston [1st Dist.] 1968, writ ref'd n.r.e.)). Probable cause "does not demand any showing that [the belief that an offense was committed] be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983). Rather, the probable cause analysis only requires the Court to find "a basis for an officer to believe to a 'fair probability' that a violation occurred." *Brown*, 217 F.3d at 246 (citing *United States v. Antone*, 753

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[5] While both Parties address the issue of probable cause in their briefs to the Court, neither Party discusses the malice issue in depth. Thus, the Court finds it sufficient to state that the record shows absolutely no evidence that Defendants acted with malice. Further attention to the malice issue is unnecessary in light of the Court's lengthy discussion regarding probable cause.

F.2d 1301, 1304 (5th Cir. 1985)). To the extent that the facts implicated in the probable cause determination are undisputed, the Court may resolve the issue as a matter of law. *See Kerr,* 171 F.3d at 340 (citing *Blackwell v. Barton,* 34 F.3d 298, 305 (5th Cir. 1994)). Thus, in order to defeat Defendants' Motion for Summary Judgment, Clark must demonstrate that the undisputed facts support an ultimate finding that probable cause did not exist at the time Washington and Cavil aided in the commencement of Clark's prosecution.[6]

Washington and Cavil assert that probable cause existed in light of the following evidence: a statement by Castillo's parents implicating Clark; Castillo's phone records (showing over 700 calls from Castillo to Clark, several of which lasted over twenty minutes); letters and a calendar containing messages written by Castillo regarding Clark; statements by Castillo's friends and classmates tending to corroborate Castillo's story; a statement by Castillo herself confirming the alleged sexual relationship; and a search of Clark's home that revealed green Trojan condoms in his night stand (the precise type and location described by Castillo in a statement made to LMISD).

Clark counters with evidence suggesting a lack of probable cause. This evidence includes Castillo's similar allegations of an affair between herself and another male

[6] A genuine, material factual dispute as to some of the elements of probable cause does not necessarily preclude a finding of probable cause, for probable cause may still be found based upon the totality of the undisputed elements. *See Kerr,* 171 F.3d at 340 n.13.

teacher;[7] telephone calls made by Castillo to male LMISD employees other than Clark; statements by Castillo's friends that Castillo had not told them about her alleged relationship with Clark; a statement by Castillo's best friend that she could not determine if Castillo was telling the truth; the fact that Castillo changed her story when interviewed by LMISD personnel; and a medical examination that revealed no indication that Castillo had been the victim of sexual assault, sexual abuse or that she had suffered the effects of any violent behavior. Clark also proposes that probable cause was lacking because Washington and Cavil stood solely "on [Castillo's] statement ostensibly corroborated by the fact that a green package containing two [ ] Trojan condoms was discovered in the bedroom of [Clark]."

Although the Court acknowledges that Clark has indeed proffered evidence that suggests the presence of a factual dispute as to some of the elements of probable cause, the totality of the evidence clearly supports a finding that probable cause existed. It is undisputed that both Castillo and her parents gave statements to LMISD confirming the alleged sexual relationship. It is also undisputed that Castillo's phone records indicated a vast number of phone calls placed by her to Clark's home and that a search of Clark's home revealed condoms of the precise type and in the specific location described by Castillo. Even if the force of this evidence was somewhat

[7] Castillo also claimed to have had a sexual relationship with coach Kelly Hazen. In addition, Castillo previously gave accounts of relationships with her junior high school band director, another LMISD coach, a janitor and several other male LMISD employees.

weakened by the competing evidence provided by Clark, and even if the prospect of obtaining a conviction was not especially viable, as a matter of law, the Court nevertheless concludes that Defendants have proffered proof of probable cause.[8] *See Brown,* 188 F.3d at 586. Thus, Clark has failed to state a claim for malicious prosecution. Accordingly, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to the malicious prosecution claims against Washington and Cavil in their individual capacities.

State Law Claims

Finally, Clark's state law malicious prosecution claim must fail as well. First, LMISD, as a political subdivision of the state, is immune from liability pursuant to Tex.Civ.Prac. & Rem.Code § 101.051 as well as Texas common law. *See Jones v. Houston Indep. Sch. Dist.,* 805 F.Supp. 476, 479 (S.D. Tex. 1991). Secondly, Washington and Cavil cannot be sued in their individual capacities under Texas law due to the doctrine of qualified official immunity. *See* Tex.Educ.Code § 22.051(a) ("A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee . . . "); *Barr v. Bernhard,* 562 S.W.2d 844, 849

[8] The Fifth Circuit's threshold for a finding is quite low. The decision in *United States v. Wadley,* 59 F.3d 510, 512-13 (5th Cir. 1995) exemplifies this notion: In that case, the Fifth Circuit held that probable cause existed to arrest a suspect who merely had fled from police in a high crime area and "reached into his pocket" while doing so.

(Tex. 1978); *Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617, 619 (Tex. 1987).[9] Therefore, Defendants' Motion for Summary Judgment is hereby **GRANTED** with respect to Clark's state law malicious prosecution claims.

IT IS SO ORDERED

DONE this 4th day of January, 2002, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

[9] In *Barr* and *Hopkins*, the Texas Supreme Court construed former § 21.912(b) of the Texas Education Code, the predecessor to § 22.051(a). Section 21.912(b) was recodified as § 22.051(a) in 1995. The recodification made no substantive changes to the immunity provision.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

TREV CLARK Plaintiff, V. LA MARQUE, I.S.D., RUSSEL E. WASHINGTON, JR., individually and in his capacity as Chief of Police for LaMarque I.S.D., and BEN CAVIL, individually and in his official capacity as Assistant Superintendent of Administration for La Marque, I.S.D. Defendants.	§ § § § § § § § § § § § §	CIVIL ACTION NO. G-99-668

FINAL JUDGMENT

For the reasons set out in the Order Granting Defendants' Motion for Summary Judgment this date, each and all of the claims of Plaintiff **TREV CLARK** against each and all of the Defendants are hereby **DISMISSED** with prejudice. Each party shall bear their own taxable costs and expenses, together with attorneys' fees incurred herein to date. All relief not herein expressly granted is denied.

THIS IS A FINAL JUDGMENT

DONE at Galveston, Texas, this the 4th day of January, 2002.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-40217

TREV CLARK

Plaintiff-Appellant

v.

LA MARQUE INDEPENDENT SCHOOL DISTRICT; RUSSEL E WASHINGTON, JR, Chief of Police, Individually and in his official capacity as Chief of Police for La Marque, Independent School District; BEN CAVIL, Individually and in his official capacity as Assistant Superintendent of Administration for La Marque Independent School District

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Galveston

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ON PETITION FOR REHEARING

(Filed Dec. 4, 2002)

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

REHG-2

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE